APR 25 1957

JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1956

No. [redacted]938

PASQUALE MOCCIO,

Petitioner,

—against—

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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No.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari be issued to review a judgment of the United States Court of Appeals for the Second Circuit, entered March 19th, 1957.

Opinions Below

The verdict of the United States District Court for the Southern District of New York, was entered April 24, 1956 and is not reported. The opinion of the Court of Appeals has not been reported but is set forth in full as Appendix "A" *infra.*

Jurisdiction

The judgment of the Court of Appeals with respect to which a writ of certiorari is sought, was entered March 19th, 1957. The time for filing a petition was extended on April 18, 1957 to and including April 25, 1957, by order of Mr. Justice Harlan.

The jurisdiction of this Court is invoked under Section 28 U. S. C. 1254 (1).

Questions Presented

1. Whether the statute of limitations was and is a bar to the prosecution of the petitioner, Pasquale Moccio.

2. Whether the trial court committed reversible error in its charge to the jury concerning the credibility of a witness accomplice.

3. Whether the trial court's interrogation of the accomplice was prejudicial to the petitioner to the extent that a fair trial could not be had.

4. Whether the entire trial, including the examination on the *voir dire* was of a fair nature.

5. Whether the petitioner was tried by due process of law as required under Amendment 5 of the Constitution of the United States.

Statement of Facts

The petitioner, Pasquale Moccio, was originally named in a previous indictment but he was tried on a "superseding" indictment numbered C147-207 filed in May, 1955. A total of ten defendants were named in the "superseding" indictment which charged a single conspiracy to violate the narcotic laws (18 U. S. C. Sec. 371, 21 U. S. C. Secs. 173 and 174, and 26 U. S. C. Secs. 2553(a) and 2554(a)), but only five defendants were prosecuted at this trial.

From February 29, 1956 to March 21, 1956, the case was tried before Honorable Alexander Bicks and a jury. The five defendants were convicted as charged (2525). On April 24, 1956, Mr. Moccio received the maximum sentence under the law—five years of imprisonment and a $10,000 fine. The other defendants received the same sentence, except Larry Quartiero who was sentenced to five years of imprisonment and a $5,000 fine.

Mr. Moccio is confined in a Federal penitentiary.

The only witness who testified against Mr. Moccio was George Salas, an accomplice who, in November 1953, was convicted for selling narcotics and for bringing narcotics into the United States (1139, 1140). He has been a seaman for twenty-eight years (1016). Salas admitted importing narcotics three or four times before his arrest on April 21, 1953, and selling them (1037-1045). He also admitted that he perjured himself at his own trial in 1953 (1050, 1051). After being in prison four or five months he wrote to the United States Attorney (1117). Sometime thereafter he was paroled and he was on parole at the time he testified at this trial (1130).

Salas stated that he knew the defendant Larry Quartiero since childhood (1053a), and on July 24, 1951, Larry Quartiero introduced him to the defendant Pagano in a Manhattan restaurant (1007, 1008). Prior to the meeting, Larry Quartiero told Salas he had a big deal for easy money (1011). At the meeting, Pagano asked Salas if he would bring a package of drugs from Le Havre, France, to the United States for $2,000. Pagano would fly to France, meet Salas in Le Havre, put the package on the ship and then fly back to New York in time to take it off the ship (1012, 1013). Salas agreed to take care of the package on the high seas (1013). Two days later Salas sailed for Le Havre (1013-1016). He sailed as a bedroom steward (1016, 1017).

Salas arrived in Le Havre, met Pagano, obtained a package from him (1017-1021), and took the package to his ship (1021-1024). The package was approximately 10" by 14" by 6" and weighed about 10 or 11 pounds (1021-1024).

Salas sailed back to New York, arriving on August 11, 1951. He left the ship without taking the package, and met Larry Quartiero who was waiting for him (1024, 1025). Larry Quartiero asked him if all the junk was okay and Salas said it was (1025, 1026). That afternoon Larry Quartiero drove Salas to a bar in Manhattan.

This is the first mention of "Steve". Pagano and one "Steve" were in the bar with a "big man" (1026, 1027). Pagano introduced Salas to "Steve", and "Steve" told Salas that the "big man" would take the package ashore, and that after the package is taken ashore Salas would be paid that night in "Larry's restaurant" (1026-1029). Salas went back to the pier and, a half hour later,

the "big man" arrived. They went aboard the ship. Salas led the way to his room, opened his locker, and showed the package to the "big man". Salas left the ship and the "big man" remained (1029-1031).

That night Salas went to "Larry's restaurant." Pagano, "Steve", and Larry Quartiero were sitting in a corner booth. Salas sat down three booths away. Steve came over to Salas and asked, "Anything I do with Larry is okay with you?" Salas said "okay." Steve went back to the corner booth and gave a big roll of money to Larry Quartiero (1032). Then "Steve" got up and left with Pagano. "Steve" and Pagano said "All right, George, good luck" (1033). This is the last mention of "Steve". Salas admitted that he had numerous conferences with Government agents and when they showed him a picture of Mr. Moccio, he could not identify Moccio as "Steve" (1088). After considerable hesitation at the trial, he identified Moccio as "Steve" (1035, 1036).

Petitioner's name or presence was not mentioned in connection with any of the remaining overt acts concerning which testimony was offered at the trial.

Larry Quartiero then went into the restaurant's kitchen, remained about 6 to 10 minutes, came out of the kitchen, and Salas joined him at the corner booth. Larry Quartiero said he would pay him only $900, but he would pay the $1100 later. An argument followed. Salas took the $900 and went out (1034, 1035).

There was no proof that Moccio ever mentioned narcotics or that anyone mentioned narcotics in Moccio's presence. Moreover, Salas admitted that he brought pack-

ages into the United States every trip, and that he sometimes took perfumes off the boat in boxes the size of the package he said he picked up in Le Havre. Sometimes he declared the perfumes, and sometimes he did not. He sold the perfumes (1113-1117). Salas never saw the contents of the package in question, and there was no proof that the package contained narcotics.

The petitioner feels, and the record shows that the trial in the District Court followed none of the well established precepts of fair judicial procedure and further, that the opinion of the Circuit Court is strained, in many instances, in order to uphold a conviction more for the charge involved rather than on the evidence presented.

Reason for Granting Writ

This case presents important questions concerning the administration of Federal criminal justice which should be settled by this Court. Moreover, the decision below conflicts with the doctrines enunciated in *Kotteakos* v. *United States, Berger* v. *United States, Fiswick* v. *United States, Bollenbach* v. *United States* and *Blumenthal* v. *United States.*

POINT I

The conduct of the prosecutor in submitting names of underworld characters to the trial court for use on the voir dire was improper and highly prejudicial, and did not make for a fair and impartial trial.

The trial judge conducted the examination of the prospective jurors on the *voir dire* and asked the following questions (19):

> "The Court: Does any member of the panel know any of the following named persons:
>
> "Anthony Stollo. (sic)
> "Tony Bender.
> "Vinny Mauro.
> "Vinny Bruno.
> "John Stapelli.
> "Charles Siegel or 'Champ' Sigel, as he is sometimes known?"

There was no response. Before asking this question, the court was not advised as to what role the abovementioned persons would play (24). Counsel for the appellant moved for a mistrial (24-27). At this point no juror indicated knowing or hearing of the persons mentioned (26, 27), and the trial proceeded.

Not a single shred of evidence was presented to show any connection with the above persons. In fact, their names were not again mentioned before the jury. During the course of the trial, however, several large New York City newspapers printed stories about a raid on a bottle club, with photographs and references to the names of Strollo, Bender, and Mauro, the first three names above-

mentioned. Bender was described as an underworld figure. Mauro was mentioned as an ex-convict and Bender's lieutenant. A newspaper photograph showed Mauro being booked at a police station, and the stories mentioned that he was convicted of burglary in 1953, robbery in 1934, had violated parole, and had been arrested on various charges including homicide. The name of Strollo appeared in the same unfavorable light as one of the biggest names in the underworld, and it was indicated that he operates under an alias (2322-2324). Counsel renewed his motion for a mistrial (2319).

It is our contention that the conduct of the prosecutor in submitting the above names to the trial court for use on the *voir dire* was improper, and the newspaper stories and photographs during the course of the trial made his conduct highly prejudicial.

There is no doctrine in the law which permits the prosecutor to show the kind of people with whom a defendant may be associated. Such proof may not even be shown after a defendant presents character witnesses to prove his reputation for honesty. *United States* v. *Chiarella,* 184 Fed. (2) 903, 911 (CCA—2nd, 1950). If it cannot be shown directly, it must not be shown by indirection through a question on the *voir dire.* Judge Learned Hand's statement in the *Chiarella* case, *supra,* is equally applicable to the case at bar: "The question was improper and the prosecution should have known that it was."

POINT II

The trial judge's interrogation of the accomplice, Salas, went beyond the court's authority to interrogate witnesses and was highly prejudicial. The interrogation brought into evidence incompetent testimony.

Salas, the accomplice, never saw the contents of the package he received in Le Harve, and there was no proof that the package contained narcotics. On one side of the story, Salas, testified that Pagano referred to a package of drugs, and the "big man" asked if the junk was okay. On the other side, Salas also testified that the package was approximately 10" by 14" by 6" and weighed approximately 10 or 11 pounds (1021-1024), that he brought packages into the United States nearly every trip, and that he smuggled perfumes in boxes the size of the package he said he received in Le Havre (1113-1117). With this posture of the testimony on the record, the trial court asked Salas the following questions and received the following answers (1143):

> "The Court: Is that the first time you ever imported narcotics?
>
> "The Witness: Yes, your Honor, the first time when I do the business.
>
> "The Court: And that is this deal?
>
> "The Witness: Yes, sir, that is the first time in my life."

Counsel for the appellant took an exception and moved for a mistrial (1145-1146a). The court attempted to cure the error by instructions to the jury (1144, 1147, 1148).

The prosecutor recognized the error because he called upon counsel for the defendants to offer any suggestions

to the Court concerning admonitions to the jury to cure the error (1156).

Though a federal judge has the authority to interrogate witnesses, where his questions contain an unwarranted assumption concerning an issue which the jury must decide, the question is beyond the court's sound discretion. Such questions create an indelible impression upon a jury, and cannot be cured by an instruction that the jurors are the sole judges of the facts. The late Mr. Justice Jackson, in a concurring opinion, joined by Mr. Justice Frankfurter and Mr. Justice Murphy, in *Krulewitch* v. *United States,* 336 U. S. 440, 453 (1949), stated:

> "The naive assumption that prejudicial effects can be overcome by instructions to the jury, cf. *Blumenthal* v. *United States,* 332 U. S. 539, 559, all practicing lawyers know to be unmitigated fiction. See *Skidmore* v. *Baltimore & Ohio R. Co.,* 167 Fed. (2) 54."

Cf. Judge Frank in *United States* v. *Grayson,* 166 Fed. (2) 863.

It is not the trial judge's questions alone about which we claim error. This case goes beyond the judges questions, assumptions, and comments, because the judge's questions brought into evidence the opinion and conclusion of the accomplice as to the contents of the package. This conclusion was not stricken from the record, and the court's instructions did not attempt to strike it. The court merely told the jury that they were the sole judges of the facts. But in determining the facts, the jury was allowed to consider the accomplice's testimony which was incompetent insofar as the actual contents of the package were concerned. His testimony constituted an opinion with

respect to the main issue on which the ultimate question of the appellant's guilt or innocence rested in this case. This issue was to be decided by the jury on the evidence, and not on the opinion of the witness concerning the package and what he assumed it to be. *Simmons* v. *United States,* 206 Fed. (2) 427 (C. A., D. C., 1953); *United States* v. *Spaulding,* 293 U. S. 498, 506 (1935), and cases therein cited; *Henkel* v. *Varner,* 138 Fed. (2) 934, 935 (C. A., 1 D. C., 1943), and cases therein cited. Where, as here, the case is a close one and there is evidence upon which the jury might have based a contrary conclusion, the error is highly prejudicial and is a ground for reversing the judgment of conviction, because it substantially affected the appellant's right to trial by jury.

POINT III

The prosecutor had 18 Rogues' Gallery photographs marked for identification and he used them throughout the three-week trial, but he never offered them in evidence. The constant repetition and the continuing effect of these photographs as they were passed back and forth in front of the jury box was highly prejudicial.

Throughout the three-week trial, to show a connection between separate and distinct overt acts, the Government paraded Rogues' Gallery photographs up to most of the witnesses and asked each witness to identify the respective photographs (58-59, 81, 84-85, 86-87, 122-123, 137, 599, 609, 732-733, 751-752, 754-755, 786, 789, 811-812, 885, 886, 887, 893, 913, 1159-1160, 1329, 1663-1664, 1671, 1683, 1685-1686, 1730-1731).

Eighteen such pictures were marked for identification and used at the trial (Government Exhibits 1 through 9, 21, 24, 25, 28, 29, 30, 44, 45, 68). Counsel objected and moved for a mistrial.

The court stated that the pictures were not shown to the jury, were never put in line of vision of the jury, that the prosecutor would turn the picture around when it was handed to a witness, and when he put it on his counsel table it was faced down, and the court allowed the pictures to be used by the prosecutor. All of the defense attorneys disagreed with the court's description of the situation. Counsel stated that these photographs were in the direct line of vision of the jury and that the jurors could see the Rogues' Gallery numbers of the photographs (904-909). We do not believe it is necessary to argue about the trial court's description of the handling of these exhibits, for it cannot be disputed that the witness stand is only a few feet away from the jury box. The constant repetition and the continuing mystery surrounding these exhibits as they were passed back and forth in front of the jury box and within only a few feet of the jurors, whether or not the jurors could see the actual faces and numbers, could lead only to confusion and prejudice. This procedure went on for three weeks, the entire trial. In the end, the prosecutor did not even offer them in evidence.

The case at bar does not concern the admission of a single Rogues' Gallery photograph as in the case of *United States* v. *Dubrin*, 93 Fed. (2) 499, 506 (CCA—2nd, 1938), cert. den. 303 U. S. 646. Great prejudice was created against the appellant by the 18 Rogues' Gallery exhibits, though not in evidence. The use of exhibits at a trial must

be on the honest basis that the exhibits are evidential. A lawyer must not present evidence which he knows the court should reject in order to get the same before the jury. *Canons of Professional Ethics, American Bar Association, No. 22.* Professor Wigmore deals with this problem in his treatise on *Evidence.* The following statement appears in Section 1808, *Volume VI* (Third Edition), page 275:

> "Where a certain class of evidence is desired to be offered, and the offering counsel knows (either from the very nature of the evidence or from objection made by the opponent at the inception of the offer or upon a previous analogous offer) that its admission will be disputed, and therefore that a judicial ruling will be necessary, a sense of professional honor will tell him that in the ordinary case the details of the offer should not be stated in the jury's hearing; because of the possibility that the statement may be taken by them as true and relevant, even though it be excluded by the judge. In this respect the rule of law enforces the standard of honor, and requires the offering counsel either to present the offer in writing, without reading it aloud, to the Court and the opposing counsel, or, if argument is expected, to afford an opportunity for the jury's retirement before orally stating the offer." (Citing cases.)

In the case at bar, no offer was made. The exhibits were marked for identification and were used repeatedly during the trial in the presence of the jury. The damage was done.

The use of these Rogues' Gallery exhibits caused the entire case to be tried in the background of numerous persons who were arrested or convicted for unknown crimes, who were not on trial and who were not connected

to the crime charged against the appellant. This was especially prejudicial because the only evidence connecting the appellant to the crime was the very brief mention of his name in the accomplice's testimony. We see no purpose in the use of exhibits that are not intended to be offered in evidence, except to prejudice the appellant wrongfully.

The conduct of the prosecutor in the case at bar is similar to the case of *Richardson* v. *United States,* 150 Fed. (2) 58, 64 (CCA—6th, 1945), charging violation of the mail fraud statute. In referring to the conduct of the prosecutor, the court stated:

> "On occasions too numerous to detail he made unjustifiable accusations and then withdrew the question; but the error was not cured.
>
> "In our opinion the effect of these statements was prejudicial. This was a close case. The injection over and over, by repetitious questions, of the idea that the Richardsons were very rich men; that the community loan agency had been defrauded of large sums by them, may well have tipped the balance against the appellant. Whether or not these appellants are guilty is not for us to decide, and as above indicated, there is sufficient evidence to support submission to the jury of the first count of the indictment. Appellants, however, were entitled to a fair trial, and they did not receive it."

The judgment was reversed and the appellants were granted a new trial.

The case against the appellant is a close case. The injection over and over again of the Rogues' Gallery exhibits was prejudicial and it may well have tipped the balance against him. The judgment must be reversed and a new trial granted.

POINT IV

The trial court committed reversible error when his Honor charged the jury with regard to the "high mark" of credibility to be given to the testimony of the accomplice, Salas.

Insofar as Mr. Moccio is concerned, one of the most important issues at the trial was whether the jury would believe the testimony of the accomplice, Salas. The court charged the jury as follows (2483-2484):

> "When an accomplice testifies, his testimony is to be received with caution and carefully scrutinized, taking into account the fact that he was an accomplice in the commission of the crime.
>
> "Likewise in this court a judge may comment on the credibility of witnesses. I shall avail myself of that privilege with respect to the witness George Salas. If I were called upon to grade his credibility I would be disposed to give him a high mark.
>
> "While a judge in this court has the right to comment upon credibility, that doesn't mean that he has the right to encroach upon your sole and exclusive function of determining the credibility of witnesses. It is merely an expression of an opinion, not an attempt to usurp your function, and you are at complete liberty to disregard entirely the view I have expressed."

However, the court continued (2486-2487):

> "If during the course of the trial I have made any comment, other than my reference to the credibility of the witness George Salas which I made in this charge, which you believe suggests my personal views on the weight of the evidence, the credibility

of the witnesses, the inferences to be drawn, or the importance of one phase or segment of the testimony as compared to another, I charge you—and I cannot emphasize this strongly enough—that you are not to give any weight whatsoever to such comment in your deliberations, for you and you alone are the judges of the weight of the evidence, the credibility of the witnesses, the inferences to be drawn, and the importance of each and every part of the testimony."

To this charge an exception was taken (2503-2504).

In a federal court the judge has the authority to interrogate witnesses, and to express his opinion upon the weight of the evidence and the credibility of the witnesses. But the jury must be made to understand that it is in no way bound by any observations of the court. *United States* v. *Aaron,* 190 Fed. (2) 144, 146-147 (CCA—2nd, 1951) cert. den.; *Freidus* v. *United States,* 342 U. S. 827; *United States* v. *Rosenberg,* 195 Fed. (2) 583, 594 (CCA—2nd, 1952), and cases therein cited; *United States* v. *Stayback,* 212 Fed. (2) 313 (CCA—3rd, 1954). The court's charge was erroneous for the following reasons.

We interpret the court's charge to mean that the jury was bound by the court's comments concernning Salas' testimony, for that is the plain meaning of the court's instruction. Though the jury was also instructed to exercise caution with Salas' testimony and that the jury had the exclusive function of determining the credibility of witnesses, the jury was told to disregard all remarks of the court "other than my reference to the credibility of the witness George Salas which I made in this charge." Generally, the words "other than" are synonymous with and

have the same legal effect as the word "except," and create an exception. *In re Nelson's Estate,* 273 N. Y. Supp. 268, 152 Misc. 245 (construing a will); *Ex parte Selma & Gulf Railroad Company,* 45 Ala. 696, 731-732 (construing a provision of a state constitution); *Sullivan* v. *Ward,* 304 Mass. 614, 24 N. E. (2) 672, 673 (a dictum with regard to the construction of a statute in a tort case). As set forth above, the court's reference to the credibility of Salas was: "If I were called upon to grade his credibility I would be disposed to give him a high mark."

In addition, the wording of the court's charge distinguishes between comments "during the course of the trial" and the Salas comment which "I made in this charge." Unlike remarks that a court may make while witnesses are on the stand, the statements that a court makes in a charge to the jury are ordinarily instructions that the jury must follow. Though a lawyer may recognize that a trial means the proceedings in open court from the selection of the jury to the rendition of a verdict, a juror is more likely to consider the actual trial over when all of the testimony and other evidence has been received and counsel for both sides have completed their summations. A juror is more likely to view the court's "charge" to the jury as something supplemental to and not "during the course of the trial." The court's charge must be adhered to, and statements made during the charge will be followed by a conscientious jury.

Salas, the accomplice, was the only witness against the appellant. It is also not without significance that counsel for the appellant made every effort to point out to the court that His Honor was substituting his judgment on a question of fact which should be decided by the jury. Coun-

sel's exception to the charge was very specific in this regard. The court, however, did not correct the error (2503-2504).

Assuming that this court does not agree with our interpretation of the trial court's charge, and finds that the jury was made to understand that it was in no way required to give Salas a "high mark", the charge was nevertheless erroneous. Since the judge let it be known that he would give the accomplice a "high mark," the only reasonable inference from this comment is that the jury, in grading the testimony of the accomplice, had good reason to believe that it too could give him a "high mark" if it wanted to. This approach is inconsistent with the caution and careful scrutiny with which such testimony should be received. "Caution" means to warn, to exhort, to take heed, or give notice of danger. *Webster's New International Dictionary,* cited with regard to the testimony of an accomplice in *Arnold* v. *United States,* 94 Fed. (2) 499, 505 (CCA—10th, 1938). What is the value of instructing the jury that when an accomplice testifies his testimony is to be received with caution and careful scrutiny, if in the next breath the court tells the jury this means an accomplice may be given a "high mark" on credibility? A witness whose credibility is given a "high mark" is not one whose testimony must be received with the caution and careful scrutiny of an accomplice's testimony. Conversely, a witness whose testimony must be received with caution and careful scrutiny is not one whose credibility we grade highly.

Though a federal judge may not be required to instruct a jury with regard to the infirmities of accomplice testi-

mony, it is the better practice to do so. *Caminetti* v. *United States*, 242 U. S. 470, 495 (1917); *Holmgren* v. *United States*, 217 U. S. 509, 523, 524 (1910); *United States* v. *Wilson*, 154 Fed. (2) 802, 805 (CCA—2nd, 1946) vacated 328 U. S. 823; *United States* v. *Becker*, 62 Fed. (2) 1007 (CCA—2nd, 1933); *United States* v. *Gallo*, 123 Fed. (2) 229 (CCA—2nd, 1941). And once the court undertakes to instruct the jury, the instruction must be clear. "A conviction ought not to rest on an equivocal direction to the jury on a basic issue." *Bollenbach* v. *United States*, 326 U. S. 607, 613 (1945).

At best, the court's charge to the jury was an equivocal direction. Salas' credibility was one of the basic issues in the case against the appellant, and the trial court, therefore, committed reversible error.

POINT V

The overt acts of June and August, 1952 were not in furtherance of the conspiracy charged against Mr. Moccio, because the participants were new parties acting without the knowledge of any other person in the conspiracy. Therefore, the last overt act occurred on August 11, 1951. The indictment was filed in May, 1955. The prosecution was barred by the three year statute of limitations.

The "superseding" indictment contains only one count, the conspiracy count. Twenty-one overt acts are specified, of which seventeen were submitted to the jury. It is the appellant's contention that the Government's proof is a conglomeration of nine distinct and separate charges. If the Court agrees with this contention, the next question

would ordinarily be whether the variance in the proof was prejudicial. *Kotteakos* v. *United States*, 328 U. S. 750 (1946); *Berger* v. *United States*, 295 U. S. 78, 82 (1935). Here, however, the Court need not go that far in order to reverse the judgment below. The important question is whether the overt acts of 1952 are part of the conspiracy or are distinct and separate. If the overt acts of 1952 are distinct and separate, the judgment below must be reversed because the prosecution is barred by the three year statute of limitations as hereinafter more fully appears.

The statute of limitations.

Section 3282 of Title 18, United States Code, was amended by changing the limitation period from three years to five years (Act of September 1, 1954, c. 1214, sec. 10, 68 Stat. 1145). The amendment provides as follows:

> "Sec. 10(a) Section 3282 of title 18 of the United States Code is amended by striking out 'three' and inserting in lieu thereof 'five'.
>
> "(b) The amendment made by subsection (a) shall be effective with respect to offenses (1) committed on or after the date of enactment of this Act, or (2) committed prior to such date, if on such date prosecution therefor is not barred by provisions of law in effect prior to such date."

The above five years statute of limitations was enacted on September 1, 1954. This statute, by its own terms, does not apply to offenses committed prior to its date of enactment, if on such date prosecution was barred by the law in effect prior to such date. The appellant contends that the last overt act that may be charged against him

occurred on August 11, 1951. In a charge of conspiracy, the statute of limitations begins to run from the date of the last overt act of which there is appropriate allegation and proof. *Fiswick* v. *United States*, 329 U. S. 211 (1946); *Brown* v. *Elliott*, 225 U. S. 392 (1912); *United States* v. *Albanese*, 123 F. Supp. 732 (So. Dist. of N. Y.) affirmed 224 Fed. (2) 879 (1955); *United States* v. *Flynn*, 103 F. Supp. 952 (So. Dist. of N. Y.) affirmed 216 Fed. (2) 354 (1954) cert. den. 348 U. S. 909; *Pinkerton* v. *United States*, 145 Fed. (2) 252 (CCA-5th, 1944). Prosecution therefor was barred on August 11, 1954, because the three year statute of limitations was in effect at that time. Since prosecution was barred prior to the date of enactment of amendment, the five year statute of limitation does not apply. Also, since prosecution was bared on August 11, 1954, the indictment should be dismissed because it was filed in May, 1955, more than three years after the last overt act.

The application of the statute of limitations was raised as a defense at the very beginning of the trial (6).

The last overt act.

The trial court charged the jury that the jury had to find either the overt act of June 7, 1952, or the overt act of August 25, 1952, before the defendants could be found guilty. The court gave this instruction to the jury because of the application of the three year statute of limitations (2447, 2447a, 2448). Thus, the basic question is whether the overt acts of June and August 1952 were part of the conspiracy charged against the appellant, Mr. Moccio.

In *United States* v. *Rosenberg*, 195 Fed. (2) 583 (1952) cert. den. 344 U. S. 838, this court discussed the distinc-

tion between *Kotteakos* v. *United States, supra,* and *Blumenthal* v. *United States,* 332 U. S. 539 (1947). The distinction between a single conspiracy and several related ones was described as follows (pages 600 and 601 of 195 Fed. (2)):

> "What distinguishes a single conspiracy from several related ones is a single unified purpose, a 'common end.' This 'common end' is in contradistinction to the 'separate ends similar in character' which characterize multiple conspiracies."

These are the crucial incidents and the parties involved in each one:

1. The overt act of August, 1952, embraced Agent Zirilli, Mr. and Mrs. Ricciardi, Pellegrino, and Rizzo.

2. The overt act of June, 1952, embraced Mrs. Greunseith, the defendant Reina, Giannini, Alfredo, Joe Hardie, and a man with Joe Hardie.

3. The overt act of August, 1951, embraced Quartiero, Pagano, a "big man", the accomplice Salas, and Moccio.

There was no attempt to connect the overt act of August 1952 directly with the overt act of August 1951. Instead, the prosecutor attempted to connect the overt act of August 1952 with the overt act of June 1952. Agent Zirilli testified with regard to the overt act of August 1952 and he named Joseph Pellegrino (also known as Joe America) and Genaro Rizzo. Agent Zirilli was shown two Rogues' Gallery photographs (Government Exhibits 25 and 68), and he testified that they were photographs of Pellegrino and Rizzo respectively (1728-1732). Mrs. Gruenseith testified with regard to the overt act of June 1952 and she

named Joe Hardie. She also stated that Government Exhibit 25 was a photograph of Joe Hardie, and that Government Exhibit 68 was a photograph of a man with Joe Hardie (1682-1695). However, Government Exhibits 25 and 68 were not admitted in evidence. In fact, they were not ever offered in evidence. Moreover, none of the numerous Rogues' Gallery photographs used at the trial was offered in evidence.

There is no connection between the two overt acts of 1952 and the overt act of August 1951, because every circumstance indicates separate and distinct transactions. No one embraced in the two overt acts of 1952 was embraced in the overt act of August 1951. To avoid the bar of the statute of limitations, the Government attempted to connect a raid on a French villa with the conspiracy charged in this case. The raid occurred within three years from the date the indictment was filed, but the alleged overt act concerning this incident, overt act No. 17, was not submitted to the jury for its consideration (2444-2447). The Government also attempted to show a connection between Giannini and Pagano.

If the appellant, Moccio, is a member of the conspiracy with Pagano, Salas, Quartiero, and a "big man", the fair import of the concerted purpose of this conspiracy does not reach out and embrace the activities of Mrs. Gruenseith, the defendant Reina, Giannini, Alfredo, Joe Hardie, and a man with Joe Hardie. Nobody is liable in a conspiracy except for the fair import of the concerted purpose or agreement as he understands it. *United States* v. *Peoni*, 100 Fed. (2) 401 (CCA—2nd, 1938). It is beyond doubt that the central aim of the conspiracy charged against the appellant—importing a package—had ended

on August 11, 1951. There can be no implied continuance of this conspiracy. The danger of implying continuation of a conspiracy in particular relation to the statute of limitations was recognized by Mr. Justice Jackson in *Krulewitch* v. *United States*, 336 U. S. 440, 456 (1949), in a concurring opinion joined by Mr. Justice Frankfurter and Mr. Justice Murphy.

The best connection that can be made between the two overt acts of 1952 and the overt act of August 1951 is that they concerned the separate importing of separate packages. These importations were "separate ends similar in character," which characterizes multiple conspiracies. There is no evidence tending to show that Pagano, Salas, Quartiero, the "big man", or the appellant joined in the conspiracy with Mrs. Gruenseith, the defendant Reina, Giannini, Alfredo, Joe Hardie, and the man with Joe Hardie. There was no single unified purpose between importations. One who imports narcotics is not a co-conspirator with every other importer of narcotics, though all such importers may have a similar purpose.

The Circuit Court noted the validity of this argument by releasing the defendant Valachi. It is submitted that the same rule should be applied to all of the defendants.

As a matter of law, therefore, the last overt act of the conspiracy charged against the appellant, Moccio, occurred on August 11, 1951. The indictment was filed in May, 1955. The prosecution was barred by the three year statute of limitations.

POINT VI

The only proof against the appellant is a very brief mention in the testimony of an accomplice. It is not sufficient evidence to sustain the conviction.

The record shows that the only witness who testified against the appellant was the accomplice, George Salas. Though a defendant in the federal courts may be convicted solely on accomplice testimony, the evidence must be substantial. The substantial evidence necessary to send a case to the jury is that evidence from which a reasonable person might conclude that the charge in the indictment was proved. *United States* v. *Feinberg,* 140 Fed. (2) 592, 594 (CCA—2nd, 1944) cert. den. 322 U. S. 726, and cases therein cited.

The uncorroborated testimony of this accomplice is not substantial proof, because if there had been no prejudicial error at the trial the jury could not reasonably have convicted the appellant, Pasquale Moccio, on such testimony. This case is similar to the case of *McGinniss* v. *United States,* 256 Fed. 621 (CCA—2nd, 1919), in which this court held that the uncorroborated testimony of an accomplice was insufficient to sustain a conviction where it appeared that (1) the accomplice was a confessed cheat, forger, and a deserter from the United States Army, and as an imposter was under investigation by the Department of Justice, (2) his testimony indicated that he was a discredited character, and (3) the court's charge did not caution the jury with regard to the infirmities of accomplice testimony.

Salas is a confessed narcotics importer and seller as well as a confessed smuggler of perfumes (1139, 1140, 1113-

1117). He testified at his own trial on a narcotics charge (1050, 1051) and four or five months after his conviction, he contacted the United States Attorney from the federal penitentiary (1117). He was thereafter placed on parole and he was on parole at the time he testified at the trial (1130). As a parolee, he was still under supervision of the Department of Justice.

Salas' testimony very briefly mentioned one "Steve" (1026-1033). But Salas had numerous conferences with Government agents after he contacted the United States Attorney, and when they showed him a picture of the appellant, Pasquale Moccio, he could not identify the appellant as "Steve" (1088). It was only after considerable hesitation at the trial that he made the identification (1035, 1036). Moreover, his testimony is that of a discredited character because he admitted taking the witness stand and perjuring himself at his own trial (1050, 1051). If he would perjure himself to avoid prison, he would perjure himself to justify his continued parole from prison.

Continuing the comparison with the *McGinniss* case, *supra*, the trial court's charge to the jury, in the case at bar, concerning the infirmities of accomplice testimony, was erroneous as more fully appears in POINT IV of this brief. In addition, the case was tried in the background of many persons who were arrested or convicted for various crimes, who were not on trial, and who were not connected to the crime charged against the appellant. This situation came about as the result of the conduct of the prosecutor who had 18 Rogues' Gallery photographs marked for identification, which he used throughout the three-week trial

knowing full well that they would not be evidential, and which he never offered in evidence. The constant repetition and the continuing effect of these photographs as they were passed back and forth in front of the jury box was highly prejudicial.

The uncorroborated testimony of an accomplice, a confessed perjurer, narcotic smuggler and seller, and perfume smuggler, on parole from a prison sentence for a narcotic crime, with a natural hope of continued immunity from imprisonment if his testimony is helpful to the prosecution, and with a very doubtful identification of the appellant made after considerable hesitation, is not substantial evidence to sustain the conviction against the appellant, Pasquale Moccio.

The judgment should be reversed and a judgment of acquittal should be entered.

CONCLUSION

We respectfully urge that the Court grant the petition for certiorari.

Respectfully submitted,

MICHAEL P. DIENZO

Attorney for Petitioner

APPENDIX A

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 160—October Term, 1956.

(Argued February 11, 1957 Decided March 19, 1957.)

Docket No. 24321

UNITED STATES OF AMERICA,

Appellee,

—v.—

GIACOMO REINA, JOSEPH VALACHI, PASQUALE MOCCIO, PASQUALE PAGANO and LARRY QUARTIERO,

Appellants.

Before:

HAND, HINCKS and WATERMAN,

Circuit Judges.

On appeals by the defendants from convictions by the District Court for the Southern District of New York (Bicks, *J.*, presiding), upon an indictment charging them with a conspiracy to sell narcotic drugs, not in stamped packages as required by section 2553(a) of Title 26, U. S. C., and not in pursuance of prescriptions as required by sections 2554(a) and 2606 of Title 26; and to import said drugs into the United States contrary to law in violation of sections 173 and 174, Title 21, U. S. Code.

MENAHEM STIM, *for the appellant Valachi.*
MICHAEL P. DIRENZO, *for appellant Moccio.*
JACOB W. FRIEDMAN, *for appellant Pagano.*
HERBERT M. WACHTELL, *for the Appellee.*

HAND, *Circuit Judge*:

These are five appeals from convictions for conspiracy to sell heroin contrary to the statutes of the United States (sections 173 and 174 of Title 21 and sections 2553(a), 2554(a) and 2606 of Title 26 of U. S. C.). The evidence showed a conspiracy made up of many persons which had been in existence before any of the appellants were proved to have joined it. A number of other parties to it had already been convicted at the time of the trial, and the first and only important issue is whether the five appellants were shown to be parties to the general conspiracy. We need not discuss this issue as to the appellant, Reina; regardless of the competence of the testimony of the informer Lafitte, enough was proved completely to implicate him in the general conspiracy as the indictment charged it. This evidence, if believed, proved that in 1949 or 1950 a number of persons, among them Orsini and Giannini, confederated together to import heroin on a large scale into this country from France and Italy. Orsini was convicted upon an earlier indictment and Giannini is dead. Their principal method was to dispatch subordinates to these countries, who took with them on the ships on which they sailed motor cars with secret compartments in which to hide the drugs. After the subordinates had received their allotments abroad they brought them back in the motor cars and delivered them to the principals who sold them through peddlers.

Appendix A

More particularly, the evidence justified a finding of the following facts. In April, 1951 Orsini was in custody at Ellis Island, awaiting deportation after conviction for another crime. There he came in contact with Lafitte, who was also in custody, and whom Orsini engaged to take his place in the venture after disclosing to him its details. Among the lesser confederates was Shillitani, who was later convicted as a co-conspirator, and who had been Orsini's especial agent. Lafitte was released from Ellis Island on the 29th of May, and soon became an informer for the Treasury Department, apparently through a Treasury agent, one, Giuliani. Lafitte introduced himself to Orsini's mistress, who was also later convicted, and who in turn introduced him to Shillitani and Shillitani's wife. Lafitte and Mrs. Shillitani tried to enlist Shillitani with them, but he was suspicious of Lafitte, until Lafitte, Mrs. Shillitani and Orsini's mistress had an interview with Orsini, who told Mrs. Shillitani to assure her husband that dealing with Lafitte was like dealing with him. This apparently laid Shillitani's doubts, and he began to deal with Lafitte. Lafitte introduced to him a Treasury agent, Pocoroba, and on July 1st, 1951, they all agreed that Shillitani should procure a quarter of a kilogram of heroin for Pocoroba, which a "runner" of Shillitani delivered to Pocoroba on the following night and for which Pocoroba paid Shillitani $3,300. The drug turned out to be of inferior quality and Lafitte and Pocoroba complained of it to Orsini. Later Shillitani and Lafitte, in search of the seller of the heroin went to a restaurant in the Bronx which Shillitani entered, leaving Lafitte in the car. When he came back he said that the seller was not there; but as they were about to leave, the appellant, Valachi, appeared and Shillitani said to him: "Joe, that merchandise you gave us, that is not par, it's not

what you said it is. I got the guy with me and he is kicking like hell." Valachi replied: "I can do nothing. It is the way I get it, it is the way I give it. I give you my word I never touch it. The way I get it is the way I give it to you. Any further time I can make good for it, let us see." This is the only testimony that we can find in the record, except the declarations of Valachi's putative confederates, that connected him with the general conspiracy.

Pagano, Moccio and Quartiero were shown to have been parties to one importation of heroin from France by the following evidence. One, Salas, a South American, was a steward on the Steamship Washington in July, 1951. He had long known the appellant, Quartiero, who on July 25 introduced him to Pagano. Pagano told Salas that, if Salas would bring some drugs from Le Havre to the United States he would give him $2,000. The drugs would be delivered to the S.S. Washington at Le Havre, and he was to secrete them on board and deliver them in New York. Pagano would meanwhile fly to Le Havre, give Salas the package, and fly back to New York in time to receive the drugs. Salas agreed, and on July 26th Pagano flew to France where, upon the ship's arrival, Pagano met Salas, delivered to him a package of about ten pounds in weight, saying: "If you lose it, you'll ruin me for the rest of my days." Salas secreted the package during the voyage and on August 4th Pagano flew back. The ship reached New York on August 11th. Salas went ashore, met Quartiero, who asked him if everything had gone smoothly and whether "the junk was O.K." Together they went to a bar on 8th Avenue where they found Pagano, Moccio, and another man who Moccio told Salas was "going to take the package ashore." After delivering the package to this man Salas was told first to go home and then to a restaurant where he would meet

Quartiero and be paid. Salas went to the ship, the man arrived and Salas gave him the package. That night Salas went to the restaurant where he met Pagano, Moccio and Quartiero. Moccio asked Salas whether he would object to his paying Salas through Quartiero, and Salas agreed. Moccio then drew out some money and gave it to Quartiero, after which he and Pagano left. Quartiero came back and gave Salas $900, saying: "These fellows can't afford to pay off now," but adding that Salas would receive the unpaid $1,100 before the ship sailed, which however he never did. Again, the foregoing is the only evidence we can find in the record that connects Moccio and Quartiero with the conspiracy, except the declarations of confederates.

First as to Valachi. We think that his conviction must be reversed on the ground of the Statute of Limitations, quite aside from any other reason. The amendment of §3283 of Title 18, extending the period of limitation to five years was not passed until September 1, 1954. Hence, if the crime had been committed before September 1, 1951, it was barred.* Moreover, since there must be some "overt act" within the period of limitation, it was necessary to prove one after September 1, 1951.** The only "overt acts" after that date that the judge left to the jury, were two, one in June, 1952 and the other in August, 1952; and both were after the sale by Valachi to Pocoroba on July 2, 1951. Valachi was not connected with either of them. The

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* Section 10(b) of the Act of September 1, 1954 provided: "The amendment made [to 3282] by subsection (a) shall be effective with respect to offenses (1) committed on or after the date of enactment of this Act, or (2) committed prior to such date, if on such date prosecution therefor is not barred by provisions of law in effect prior to such date."

** *Brown* v. *Elliott*, 225 U. S. 392, 401; *Fiswick* v. *United States*, 329 U. S. 211, 216.

prosecution answers that this was unnecessary, because, once it is shown that a person has become a party to a conspiracy the law presumes that he remains a party while it continues, unless he shows that he has left it. Therefore, since Valachi did not show that he had broken off his connection with Shillitani, he remained a party until after September 1, 1951, and the "overt acts" will serve. We should accept this reasoning, if we thought that Valachi's sale of the parcel to Pocoroba was evidence that he knew it was in execution of the larger venture: that is, that he was cooperating in the series of importations that made up the conspiracy charged. His sale was indeed not inconsistent with that knowledge; but it was equally consistent, so far as we can see, with his being an independent peddler of narcotics, whom Shillitani selected as the most immediately available source of supply for Pocoroba's needs. In deciding that there was no evidence forbidding this second possibility, we may not consider any declarations of the proved conspirators, such as Orsini or Shillitani, for these were hearsay until Valachi's connection with the conspiracy was proved by other evidence. His own declaration was of course competent against him, but it was altogether equivocal as to the source of his supply. Indeed, were we to speculate, we should incline to read it as indicating that he bought at random. For these reasons we hold that the statute had run on May 16, 1955 as to Valachi. This result is quite independent of whether under the doctrine of *Kotteakos* v. *United States*, 328 U. S. 750, and *Blumenthal* v. *United States*, 332 U. S. 539, the variance between the allegation and the proof was, or was not, "harmless."

On the other hand, there can be no doubt that the statute does not protect Pagano, whom, quite aside from the transaction with Salas, the evidence proved to have

been deep in the general business of the "ring," of which Salas's importation was a part. The "overt acts" of June and August 1952, being in execution of this general conspiracy, were late enough to support the indictment. The evidence against Moccio and Quartiero requires, however, a little analysis. Although Lafitte's testimony does not touch either of them, a jury might infer from their transaction with Salas that they were parties to the general enterprise. In addition to what we have already set forth, Salas testified that on August 11, 1951, when Quartiero "dropped me off at 67th Street" he told him that "if I stick to them I am going to make big money in no time"; and from this alone the jury might have found that Quartiero at any rate was inviting Salas into an undertaking that comprised more than the single imported parcel and was general in scope. Salas's further testimony as to what took place on the evening of the same day confirmed such a conclusion and of itself was enough to support the verdict against Moccio. The value of the parcel as contraband, judged by the agreed price for the Valachi package, must have been in the neighborhood of $50,000. Pagano, as Moccio knew, had bought it in France and had smuggled it in; and when Moccio paid Salas it was obvious that he did so, either because he was the buyer himself, or was an agent of Pagano, or of Pagano's principals. If he was a buyer, the quantity proved that it was not for his own use, but for sale as contraband. In short, he was an outlet, or customer, of the importers who were obviously Pagano's principals. That was alone enough to charge him as a conspirator.* It is true that the evidence

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* *United States* v. *Bruno*, 105 F. 2d 921 (C. A. 2) (reversed on another point, *Bruno* v. *United States*, 308 U. S. 287); *United States* v. *Todaro*, 145 F. 2d 977 (C. A. 2).

did not connect Quartiero or Moccio with the conspiracy after August 11, 1951, but since they were shown to have become parties to it then, the presumption applied to them that they continued in it until they proved that they had left it, which they did not try to do.

The doctrine of *Kotteakos* v. *United States, supra,* and *Blumenthal* v. *United States, supra,* does not extend to the conviction of the other four appellants. We are not indeed altogether sure that we understand its exact limits, as it was modified by the second decision. Certainly there is no "variance" between the charge in the indictment and the convictions that we are affirming. If there was error in trying Valachi along with the others, because of the possibility that the jury might sweep him into the wider undertaking because of his association with the others, that was an error of which he alone may complain. It would be gratuitous to suppose that the evidence against him could have turned the scale against them.

The next alleged error is that the court should not have allowed the jury to consider the testimony of Lafitte and Salas. It is true that only Valachi challenges Lafitte's testimony, but we will assume that Moccio and Quartiero would be entitled to the benefit of the error, if there was one. Lafitte was endlessly cross-examined, and we will take it that his credibility was successfully attacked by the contradictions which emerged between what he had sworn to before and his testimony at the trial; and that his character and background showed him to be "a person of low moral character," as the prosecution itself declared him to be in another proceeding. All this appeared upon this trial, and we cannot understand on what theory it is supposed that the judge should not have allowed the jury to consider his testimony, and reply upon so much of it

as they chose. The decision of the Supreme Court in *Mesarosh* v. *United States*, 352 U. S. 1, is completely different. The evidence that determined the court to reverse that conviction had not been discovered at the trial, and had never been before the jury; and the Solicitor General had recommended that the issue should be examined in the district court. The only question was whether the relief should be so limited, or whether the conviction should be reversed without more, as to which the court divided. It has been held over and over again that in federal jurisprudence a conviction may depend upon the uncorroborated testimony of an accomplice.* Furthermore, with exceptions such as perjury and treason where the procedure descends to us from the ecclesiastical law, our law has never undertaken to set any quantitative standards of verity; we have unconditionally left it to the jury to determine how persuasive the testimony of any witness shall be. In *McGinniss* v. *United States*, 256 Fed. 621, we disregarded both these limitations upon the prerogative of the jury; it was an inadvertence and we take this occasion to overrule it.

The other alleged errors do not need extended consideration, for they are quite without merit. The testimony of the interpreter who acted for Cusack, the Treasury agent, in France was competent, not only because of Cusack's testimony that he knew enough French to understand Ansaldi, but because the interpreter was himself an accomplice, acting as such at the time. The judge was so plainly within his powers in commending Salas, that it is

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* *Glasser* v. *United States*, 315 U. S. 60, 80; *United States* v. *Manton*, 107 F. 2d 834, 839 (C. A. 2); *United States* v. *Compagna*, 146 F. 2d 524, 527 (C. A. 2); *United States* v. *Rosenberg*, 195 F. 2d 583, 592 (C. A. 2).

strange that the objection should be seriously urged. So too of the examination of the jurors on *voir dire*, the use of the photographs in the "Rogues Gallerey," the charges of bias on the part of the judge and the supposed improper conduct of the prosecuting attorneys.

Convictions of Reina, Quartiero, Pagano and Moccio are affirmed.

Conviction of Valachi is reversed.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 938

PASQUALE MOCCIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 28-37) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on March 19, 1957 (R. 77). A petition for rehearing was denied on April 15, 1957 (R. 89). On April 18, 1957, the time for filing a petition for a writ of certiorari was extended by Mr. Justice Harlan to and including April 25, 1957. The petition was filed on April 25, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence supports the conclusion that petitioner was party to a conspiracy extending into the period of limitations.

2. Whether the trial judge's error in asking a question which assumed that the substance carried by the witness was narcotics was cured by his immediate instructions that the jurors were the sole judges of the facts.

3. Whether the trial judge erred in commenting on the credibility of an accomplice witness in his instructions.

4. Whether error occurred on *voir dire*.

5. Whether the prosecutor erred in using "rogue's gallery" pictures for identification only, where the pictures were kept from the sight of the jury, never admitted into evidence or described, and were necessary to establish identity.

STATEMENT

An indictment, filed May 16, 1955, in the United States District Court for the Southern District of New York, charged petitioner and nine other defendants with conspiracy to violate the narcotic laws (R. 10-14). Ten other co-conspirators, not defendants, were also named. Five of the defendants went to trial—petitioner, Reina, Valachi, Pagano, and Quartiero—and the jury found all five guilty as charged (R. 55, 57, 59, 61, 63). Petitioner was sentenced to five years imprisonment and a $10,000 fine (R. 59-60). On appeal, the Court of Appeals for the Second Circuit reversed as to

Valachi,[1] but affirmed as to the other defendants, including petitioner.

The evidence may be summarized as follows:

In April, 1951, Joseph Orsini was in custody at Ellis Island, awaiting deportation (Tr. 69). While there he met Pierre Lafitte, who was also in custody (Tr. 58). He took Lafitte into his confidence and invited him to take part in the business of illegally importing narcotics into the United States for sale—a business Orsini said, was then being carried on by Orsini and his partners both here and abroad (Tr. 71-76, 98-99). Lafitte contacted Agent Arthur G. Giuliani of the Narcotics Bureau, three days later (Tr. 70, 153). Soon thereafter, Lafitte was released from Ellis Island to participate in Orsini's business as a Government agent (Tr. 83, 153a). Through Orsini's girl friend, Marcelle Ansellem, Lafitte met Shillitani, Orsini's agent, and other members of the importing ring (Tr. 83-87).

The ring usually brought illegal drugs to this country by dispatching subordinates to France and Italy, who brought back with them, aboard ship, motor cars equipped with secret compartments to hide the drugs (Tr. 75-76). The subordinates would receive the drugs abroad from ring members (Tr. 100), who would identify themselves through a prearranged code (Tr. 121-122, 1681). The drugs were brought back in large quan-

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[1] Valachi sold narcotics to Pocoroba, a government agent, through Shillitani, a co-conspirator, on July 2, 1951. The Court of Appeals held that this evidence was consistent with the theory that the sale was not in execution of the over-all conspiracy charged, and that, since there was no other evidence that Valachi had joined in the larger plan, he was not chargeable with the two overt acts falling within the limitations period the court deemed applicable.

tities (Tr. 119) and turned over to the principals, who sold them as wholesalers through large distributors and peddlers (Tr. 104). All trip expenses were paid by the principals (Tr. 791, 795, 797, 1663). Some of the earlier and more important members of the ring, which was in operation by at least mid-1950 (Tr. 787), were Orsini, an admitted ringleader (Tr. 71-76); Giannini, who helped to arrange various trips in 1950, 1951 and 1952, and himself went to Montreal, Canada and Europe several times to further the ring's activities (Tr. 787, 1666, 1680-1681); Shillitani, Orsini's agent in the business, who figured in all of the ring's activities until his arrest and was a friend of Giannini (see *United States* v. *Shillitani*, 16 F.R.D. 336); Reina, who assisted in arranging trips in 1950 and went to Europe on ring business (Tr. 1665, 1679-1680); and Pagano.

Pagano first appears as an associate of Giannini in the spring of 1950, when the two went to the office of Charles Spar, a New York attorney, and sought Spar's assistance in obtaining a passport for Pagano (Tr. 742-748). Spar performed this same service for most of the other ring members and couriers, without knowing of their wrongful intentions (Tr. 664-665, 709, 739, 741-748, 790). Pagano went to Europe on April 12, 1951 (Gov. Ex. 36, 39M), and shared a hotel suite with Giannini in Milan, Italy (Gov. Ex. 51). Giannini had been in Europe for extended periods during 1950 and 1951 on narcotic ring business (Tr. 717, 731, 1667-1670; Gov. Exs. 38, 39K, 39L, 59).

By June, 1951, Lafitte was a trusted member of the group, and on the twenty-ninth of that month Shillitani showed him a letter from France saying that nearly four kilograms of heroin were ready for immediate

delivery (Tr. 106-107). Lafitte saw a second letter to similar effect on July 3, 1951 (Tr. 119, 598). Apparently in response to this, Pagano brought Pasquale Capasso to Spar's office on July 12, explained that they wanted a passport for Capasso, and indicated they were in a "hurry" (Tr. 745-750). Pagano witnessed Capasso's passport application, and Capasso left for Paris the next day, ostensibly for a "two weeks vacation". He returned eight days later (Tr. 1641; Gov. Ex. 37, 66, 67).

On July 24, 1951, Pagano, at a meeting arranged by Quartiero, offered George Salas, a ship steward, $2,000 to bring a package of drugs from Le Havre, France, to New York (Tr. 1011-1012, 1016). Salas agreed (Tr. 1013). Pagano flew to France the next day and met Salas in Le Havre when Salas' ship docked there (Tr. 1017-1018). Later that day, Pagano turned over to Salas a package weighing about ten pounds, cautioning him that he (Pagano) would be ruined if the package were lost (Tr. 1020-1021, 1024). Salas secreted the package aboard ship on the return voyage, arriving in New York on August 11, 1951 (Tr. 1024-1025). He was met by Quartiero, who asked if the "junk was okey" and received an affirmative answer (Tr. 1024-1025). Later that day, Salas and Quartiero went to a Manhattan bar where they met Pagano, petitioner Moccio, and an unidentified "big man" (Tr. 1026-1027, 1035, 1036). Pagano introduced Salas to petitioner, who then explained to Salas the procedure to be followed in getting the package ashore (Tr. 1027-1029). Salas was to return to the ship, wait until he was contacted by the "big man", and turn the package over to him. The "big man" would carry the package ashore,

and Salas would be paid that evening for his services. Everything proceeded according to the plan. That night, Salas went to the meeting place, a restaurant, to receive his share (Tr. 1029-1032). He found Pagano, petitioner, and Quartiero conversing in a booth (Tr. 1032). Salas took another booth. After about fifteen minutes, petitioner joined him and asked permission to settle with Salas through Quartiero. Salas agreed. Petitioner returned to Pagano and Quartiero, gave Quartiero a big roll of money, and then left the restaurant with Pagano (Tr. 1032-1033). As matters turned out, Quartiero gave Salas only $900, instead of the promised $2,000 (Tr. 1034-1035).

In November, 1950, defendant Reina contacted Mrs. Johanna Gruenseith and asked her if she would like to visit her parents in France, the expenses to be paid by Reina (Tr. 1662-1663). She agreed, made the trip, and was contacted in Paris by Giannini (Tr. 1665-1666). Mrs. Gruenseith, who knew Giannini, Shillitani, and Spirito (Tr. 1662-1665), was told to go to Milan, pick up a package from one "Alfredo" and bring it back to the United States for Giannini. This she tried to do, but "Alfredo" was unable to supply the package, so she returned empty-handed to the United States (Tr. 1667-1670). She made a second fruitless trip in January, 1951 (Tr. 1670-1672).

In May, 1952, Reina again asked Mrs. Gruenseith if she would like to see her parents in France, and she agreed (Tr. 1679-1680). Before leaving New York, Giannini asked her, in Reina's presence, to bring back to him a package which she was to receive from his brother-in-law in Salerno, Italy (Tr. 1680-1681). She was contacted in Salerno by Pellegrino, the

brother-in-law, amnd Rizzo, on June 7, 1952. They gave her four packagess containing heroin (Tr. 1684). She returned to New York with as much of this heroin on her person as shee could conceal and turned it over to Reina and Gianniini (Tr. 1686-1694).

On August 25, 1952, Agent Zirilli went to Pellegrino in Salerno, Italy and told Pellegrino that he was a friend of Giannirni's who was to take narcotics to the United States (Tr. 1729-1731, 1735, 1740). Pellegrino then turned over four kilograms of heroin to Zirilli, and was arrested as he did so (Tr. 1737).

ARGUMENT

1. On the issuee of the statute of limitations, we may assume that the overt act in which petitioner was shown personally to havve participated—the smuggling of narcotics by Salas in August 1951—falls outside the period of limitations.[2] However, two overt acts charged in the indictmentt and established by the evidence—the delivery of narcotics to Mrs. Gruenseith in June, 1952, and the delivery of narcotics to Zirilli in August, 1952

[2] It would seem that the six-year statute of limitations applicable to a conspiracy to evade taxes, established by 26 U.S.C. (1946 ed.) 3748, rather than the three-year statute fixed by that section generally, applies to a conspiracy to commit the offenses under the Internal Revenue Code, *i.e.*, sale of narcotics without order forms and not in the original stamped package. In *Braverman* v. *United States*, 317 U.S. 49, it was held that this statute is applicable to a conspiracy to evade federal taxes in the possession and transportation of distilled spirits without tax stamps. By the same token, it should apply to the sale of narcotics without meeting Treasury requirements. The Court of Appeals for the Eighth Circuit has held otherwise. *Wesson* v. *United States*, 164 F. 2d 50.

As to the importation of narcotics in violation of 21 U.S.C. 174, the period of limitations is that fixed by 18 U.S.C. 3282. That statute was amended by the Act of September 1, 1954, 68 Stat. 1145, to extend the period from three to five years, but not as to offenses already barred.

—are clearly within the statutory period. The issue, therefore, is whether the jury could properly find, as it was told it had to find (R. 23), that there was one general conspiracy of which these overt acts were in furtherance, and that petitioner was a member of that general conspiracy.

(a) The evidence amply supports the conclusion of the jury that there was one broad general conspiracy, continuing over an extended period of time, to import large quantities of narcotics of high quality into the United States and sell them here. The large number of overt acts which conformed to a single pattern justify the inference drawn by the jury that this was one massive conspiracy, directed by a central force, in furtherance of a common design. The attitude taken by those named as conspirators is also persuasive. They spoke and dealt with each other as partners, not as independents operating at arm's length.

It is true that there was some change in the active direction of the conspiracy after April, 1951, when Orsini was no longer able to participate actively. But it is also clear that this did not change the basic character or personnel of the conspiracy. Giannini, Reina and Pagano were active in the conspiracy before Orsini left and continued to remain active during the entire period covered by the indictment. They arranged passports for couriers. They obtained bonds and insurance for various automobiles used. They arranged transportation when it was necessary to do so. They saw to it that the couriers were met in Europe, that they received the narcotics, and that they were met again in New York, where delivery took place. The operations were carefully integrated and it is plain

that all participants acted pursuant to a common design to further a common end. Cf. *Blumenthal* v. *United States,* 332 U.S. 539, 557; *United States* v. *Rosenberg,* 195 F. 2d 583, 600 (C.A. 2), certiorari denied, 344 U.S. 838; *United States* v. *Morris,* 225 F. 2d 91, 92 (C.A. 7); *United States* v. *D'Ercole,* 225 F. 2d 611, 614 (C.A. 2).

(b) The overt acts with which we are primarily concerned—those in which petitioner directly participated and those performed in June and August, 1952—were in execution of the general conspiracy. The arrangements with Salas made by Pagano, after Shillitani had received word that narcotics were ready and after the trip hurriedly arranged for Capasos had apparently proved unsuccessful, were clearly part of the general pattern of importation. So, also, was Mrs. Gruenseith's trip in June, 1952. This last trip, like earlier ones of Mrs. Gruenseith, was arranged by a member of the central group. Her duties were explained to her by Giannini, a major figure in the conspiracy. She received the drugs in Salerno, Italy, from a person who claimed a marriage relationship with Giannini, and who obviously knew she was coming. The August, 1952, overt act involving Agent Zirilli followed the established pattern. He was accepted as having been dispatched by Giannini. The narcotics were brought to him by Pellegrino, Giannini's brother-in-law. The quality of the heroin was up to the usual standard. As the court below held (Pet. 34), the acts of June and August, 1952, show that the conspiracy here charged was one which continued well into the period of limitations.

(c) Petitioner was a party to the general conspiracy. He was the one who explained to Salas the method to be

used in bringing the package ashore, and it was he who paid Salas for his services. Petitioner and Salas met on two occasions, both times in the presence of Pagano and Quartiero, and petitioner left with Pagano after paying Salas and Quartiero.[3] Petitioner was close enough to Pagano, a principal figure, to be permitted to handle an extremely valuable shipment. The jury could well infer that petitioner must have been a party to the over-all conspiracy to be entrusted with so delicate and important a part in the proceedings. On the evidence, petitioner stands stamped as Pagano's confidant and trusted subordinate.

With petitioner thus closely identified with the central core of this large, continuing operation, the jury had the right to believe that he continued to remain a part thereof while the ring was in operation, as it unquestionably was during the period of limitations. *Hyde* v. *United States,* 225 U.S. 347, 369. Petitioner did not attempt to show that he had withdrawn from the conspiracy. Under these circumstances, the 1952 overt acts are chargeable against petitioner, even though he did not take part in them. *Pinkerton* v. *United States,* 328 U.S. 640, 646.

2. While the witness Salas was on the stand, the trial judge asked him two questions which assumed as a fact that the package transported by Salas contained nar-

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[3] Petitioner admits that Salas identified him at trial but contends no reasonable person could believe Salas, who had imported drugs on several other occasions and admittedly did not tell the truth at his own trial (Pet. 25). That was an issue of credibility for the jury to resolve. A conspiracy conviction may be sustained on the uncorroborated testimony of an accomplice. *Caminetti* v. *United States,* 242 U.S. 470, 495; *Newman* v. *United States,* 220 F. 2d 289, 290 (C.A. 5), certiorari denied, 350 U.S. 824; *United States* v. *Compagna,* 146 F. 2d 524, 526 (C.A. 2), certiorari denied, 324 U.S. 867.

cotics (Tr. 1143). Petitioner contends that this trenched on the jury's function and that the answers introduced incompetent opinion evidence as to the package contents, all to his prejudice.

The trial judge, however, is entitled to ask questions to aid in developing the facts, especially in a lengthy case such as this. *Glasser* v. *United States,* 315 U.S. 60, 82; *Simon* v. *United States,* 123 F. 2d 80, 83 (C.A. 4), certiorari denied, 314 U.S. 694. Perhaps, the questions were technically erroneous, as phrased; but, if so, the error was cured, for, when the matter was called to his attention, the judge forcefully instructed the jury that he had not intended to express any opinion as to the contents of the package, that the jurors were to disregard the underlying assumption, and that they were the sole judges of the contents of the package (Tr. 1147-1148). It must be presumed that the jurors followed this instruction. *Delli Paoli* v. *United States,* 352 U.S. 232, 242; *Opper* v. *United States,* 348 U.S. 84, 95.

3. During his charge, the trial judge informed the jury that "* * * an accomplice in the commission of a crime is a competent witness, * * *" whose testimony is often essential to the prosecution. He warned them that such testimony "* * * is to be received with caution and carefully scrutinized, * * *", but that, for his own part, "[i]f I were called upon to grade his [Salas'] credibility I would be disposed to give him a high mark" (R. 49). Petitioner urges that the trial court thereby led the jury to believe that it was bound by his comment, and that this comment destroyed the value of his charge that the jury was to receive accomplice testimony with caution.

Immediately after giving the questioned instruction, the trial court said (R. 49):

> While a judge in this court has the right to comment upon credibility, that doesn't mean that he has the right to encroach upon your sole and exclusive function of determining the credibility of witnesses. It is merely an expression of an opinion, not an attempt to usurp your function, and you are at complete liberty to disregard entirely the view I have expressed.

In the light of this instruction, the Court of Appeals below was clearly correct in saying (Pet., 36-37): "The judge was so plainly within his powers in commending Salas, that it is strange that the objection should be seriously urged." A federal judge may comment outright on any portion of the evidence, telling the jury how it struck him, provided that he also tells them that they are not bound by his expression of his own view. *Simmons* v. *United States,* 142 U.S. 148, 155; *United States* v. *Rosenberg,* 195 F. 2d 583, 594 (C.A. 2); *United States* v. *Aaron,* 190 F. 2d 144, 146-147 (C.A. 2), certiorari denied, *sub nom. Freidus* v. *United States,* 342 U.S. 827; *Bernal-Zazueta* v. *United States,* 225 F. 2d 60, 62 (C.A. 9). That is the case here.

4. On February 10 and 11, 1956, almost three weeks prior to the beginning of trial, Anthony Strollo and Vincent Mauro had been mentioned in New York newspapers as underworld figures involved in a police raid on a "bottle club" (Tr. 2320-2321). During the *voir dire*, the trial judge, at the request of the government, asked the following question:

> The Court: Does any member of the panel know any of the following named persons:

Anthony Stollo. (sic)
Tony Bender.
Vinny Mauro.
Vinny Bruno.
John Stapelli.
Charles Siegel or "Champ" Siegel, as he is sometimes known?

All of the jurors indicated they had not heard of these people (Tr. 2321).

On March 16, 1956, certain New York newspapers carried stories about the arrest, indictment, and arraignment of Strollo, Mauro, and Anthony Bender in connection with the above-mentioned raid (Tr. 2323-2324). Four days later, counsel for petitioner moved for a mistrial on the ground that petitioner was prejudiced by the earlier mention of these names (Tr. 2319). He now asserts that the refusal to grant this motion was error.

The government had information that the persons named during the *voir dire* were intimate friends of petitioner, Pagano and Valachi (Tr. 2324-2325). Bender and Mauro had been clients of petitioner's trial counsel (Tr. 2326). Therefore, it was proper to inquire as to whether any juror knew these persons. Petitioners' counsel at trial admitted that all of the jurors said they had not read the newspaper articles which appeared before trial (Tr. 2322). After it was ascertained that no juror knew anything about Strollo, Mauro, or Bender, they were not referred to again in the presence of the jury or connected to petitioner (Tr. 2319-2320). Therefore, the articles appearing before trial could not have prejudiced petitioner. See *Thiede* v. *Utah Territory*, 159 U.S. 510; *Spies* v. *Illinois*, 123 U.S.

131; and *Hopt* v. *Utah*, 120 U.S. 430. Even where jurors have seen adverse newspaper reports, they are not necessarily disqualified. The test is whether they can consider the evidence impartially. Obviously, if they have not seen the articles there can be no prejudice.

As to the March 16 articles, the trial court asked if petitioner's counsel wanted inquiries to be made to learn if the jurors had seen the articles or had been influenced by them (Tr. 2328-2329). Counsel for petitioner expressly declined the opportunity (Tr. 2329-2330). Under these circumstances, petitioner cannot claim error or prejudice. It cannot be assumed that the jurors read the newspaper accounts in question, *McHenry* v. *United States*, 276 Fed. 761, 764 (C.A. D.C.), much less that they were prejudiced thereby. *Cwach* v. *United States*, 212 F. 2d 520 (C.A. 8). The way was open for petitioner to raise his "* * * contention of bias from the realm of speculation to the realm of fact." *Dennis* v. *United States*, 339 U.S. 162, 168. He did not choose to do so and cannot complain now.

5. As mentioned, *supra*, p. 2, only five of the ten defendants named in the indictment were tried in this proceeding. Furthermore, there were ten co-conspirators named in the indictment who were not defendants. Many of these persons were known to the various government witnesses under aliases or nicknames only. Therefore, the prosecutor used eighteen "rogue's gallery" photographs to aid the witnesses in their identification of the persons with whom they had dealt.[4] The

[4] The pictures were of Orsini (Tr. 59); Marcelle Ansellem, Orsini's girl friend and a co-conspirator (Tr. 81-82); Geraldi, a man Orsini wanted Lafitte to meet (Tr. 84); Randazzo, a partner (Tr. 85); Shillitani, a co-conspirator (Tr. 87); Sansone, who was involved

photographs were marked for identification only, were not shown to the jury, were never put in their line of vision, and were always face down when placed on counsel's table (Tr. 906).

The pictures were relevant as aids in identifying various persons whose identity was material to the issues of the case. *United States* v. *Dubrin*, 93 F. 2d 499, 506 (C.A. 2), certiorari denied, 303 U.S. 646; *Cooper* v. *State*, 182 Ga. 42, 184 S.E. 716; and see *Wilson* v. *United States*, 162 U.S. 613, where the photograph of a homicide victim was held admissible to show identity. The photographs were carefully kept away from the jury. No error appears, for the photographs were restricted to their proper use and purpose.

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with Orsini, see *United States* v. *Sansone*, 231 F. 2d 887 (C.A. 2), (Tr. 137); D'Agostino, a friend of Sansone who sold narcotics to Shillitani (Tr. 126, 138); Spirito, a co-conspirator (Tr. 138); Martello, who dealt with Shillitani in narcotics (Tr. 111-114, 138); Giannini, a co-conspirator (Tr. 733); Capasso, for whom Pagano obtained a passport (Tr. 745-746, 751); Pellegrino, a co-conspirator (Tr. 755); Spirito's wife, who figured in overt act number 1 (Tr. 812); Giribone, a defendant who was not on trial (Tr. 812, 813); Siano, a co-conspirator (Tr. 913); Baldini, also known as Antoine Bergeret (Tr. 1329), and Ansaldi, defendants not on trial (Tr. 1159-1161); Pellegrino, also known as Joe Hardie, Giannini's brother-in-law and a co-conspirator (Tr. 1683, 1731); and Rizzo, a co-conspirator (Tr. 1731).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY 1957.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1957 420642 1288